Supreme Court, U.S.
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No. 98-1290

In the Supreme Court of the United States

OCTOBER TERM, 1998

VIRGINIE GSCHWIND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF THE CESSNA AIRCRAFT COMPANY

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QUESTIONS PRESENTED

In 1993, petitioner's husband was killed when the airplane he was flying crashed in France. Two years later, petitioner sued respondents The Cessna Aircraft Company, the manufacturer of the airplane, and Pratt & Whitney Canada, the manufacturer of the airplane's engine, in Ohio state court. Respondents removed the case to federal court; they then moved to dismiss for *forum non conveniens*, and Cessna moved to transfer to the District of Kansas pursuant to 28 U.S.C. § 1404(a). After the case had been transferred to Kansas, the district court there considered and granted respondents' motion to dismiss for *forum non conveniens*. Petitioner appealed, and the Tenth Circuit affirmed.

The questions presented are:

1. In a case with facts and a procedural history similar to *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), has petitioner advanced any substantial reasons for the Court to grant certiorari to review the Tenth Circuit's application of the *forum non conveniens* standards established in *Piper* and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)?

2. Whether, in a removed case dismissed for *forum non conveniens*, where a challenge to subject matter jurisdiction is not raised until after the court of appeals has affirmed the dismissal and, thus, the court of appeals has not addressed that issue, this Court should grant certiorari to consider an issue that was not briefed, argued, or decided below?

LIST OF PARTIES

Respondent The Cessna Aircraft Company is a wholly owned subsidiary of Textron Inc. Respondent Pratt & Whitney Canada is a subsidiary of United Technologies Corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit for which petitioner seeks review (Pet. App. 3a–15a) is reported at 161 F.3d 602. The underlying district court opinion (Pet. App. 16a–39a) is not reported.

STATEMENT OF THE CASE

On August 16, 1993, Cyril Gschwind, a French citizen living in Belgium, was killed when the airplane he was flying crashed in southern France. Nearly two years later,

petitioner, Mr. Gschwind's widow, brought this wrongful death action in the Court of Common Pleas for Montgomery County, Ohio, against The Cessna Aircraft Company, Pratt & Whitney Canada, and Hartzell Propeller, Inc. Respondents removed the case to the federal district court for the Southern District of Ohio. Hartzell was later dismissed for reasons not germane here.[1]

Cessna then moved to dismiss for *forum non conveniens*, or, in the alternative, to transfer the case to the District of Kansas pursuant to 28 U.S.C. § 1404(a). Pratt & Whitney Canada moved to dismiss either for lack of personal jurisdiction or for *forum non conveniens*. The United States Magistrate Judge recommended denying the motions to dismiss, but granted Cessna's motion to transfer. Respondents thereafter filed timely objections to the Magistrate's recommendations on the motions to dismiss.

After the transfer to Kansas, the district judge allowed supplemental briefing on the *forum non conveniens* issue. The district court considered these submissions and then

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[1] In her statement of the case, petitioner states that, while the case was still pending in the Southern District of Ohio, she moved to remand it to state court for lack of federal jurisdiction. Pet. at 3. What she fails to say, however, is that her motion to remand was based solely on the grounds that the presence of Hartzell, an Ohio corporation, defeated diversity jurisdiction under 28 U.S.C. § 1332(a)(1). Although she argued in her motion that Hartzell was a proper party to the litigation, Hartzell was ultimately dismissed because the propeller on the airplane was, in fact, manufactured by Macauley Accessory Division, a division of Cessna. Since the petition fails to specify the basis on which petitioner challenged federal subject matter jurisdiction, it may leave the Court with the false impression that her challenge was based on a lack of alienage diversity jurisdiction. It was not. The jurisdictional basis for the remand motion was altogether different from the alienage diversity issue mentioned in the petition. Petitioner did not seek interlocutory review of the court's denying her motion to remand.

granted the *forum non conveniens* motions, conditioned on respondents' agreeing to safeguards assuring that an alternative forum is available, including producing witnesses and submitting to jurisdiction in France, and waiving any applicable statute of limitations defenses. Respondents complied with these conditions and judgment was entered for them. Petitioner appealed.

Unanimously affirming the dismissal, the Tenth Circuit held that respondents bore the burden of proving that an adequate alternative forum was available to petitioner. Pet. App. at 7a. It upheld the district court's conclusion that France is an adequate alternative forum for petitioner's claims. Pet. App. 7a–10a. The court of appeals began its analysis by finding that the district court gave reasonable deference to petitioner's choice of forum. Pet. App. at 6a–7a. It then evaluated whether the district court had weighed public and private interest factors as required by *Gilbert* and *Piper*, and whether its balancing of those factors had been reasonable. Pet. App. 10a–13a. Noting that it was not its province to review *de novo* the evidence bearing on those factors, Pet. App. at 7a, and finding the district court's decision-making reasonable, within its sound discretion, and consistent with *Gilbert* and *Piper*, the Tenth Circuit affirmed. It unanimously, and without comment, denied petitioner's petition for rehearing and suggestion for rehearing en banc. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

The decision below correctly applied the well-settled principles established in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) to the fact-intensive question of *forum non conveniens*. The decision does not conflict with other courts of appeals, and does not present any issue that warrants further review. The petitioner's principal argument—that the Tenth

Circuit has set a new standard by which evidence bearing on private and public interest factors for *forum non conveniens* must be judged—is based on a plain misreading of the Tenth Circuit's decision.

The various conflicts alleged in the petition are, in truth, not conflicts at all. They are, instead, products of petitioner's misstatements of and exaggerations about the nature of the Tenth Circuit's decision and the holdings of other cases. The decision below was a straightforward application of the well-settled doctrine of *forum non conveniens*. It does not warrant an exercise of this Court's certiorari jurisdiction and does not present any important new issues on *forum non conveniens*. For these reasons, the petition should be denied.

ARGUMENT

A. THE DECISION BELOW IS CONSISTENT WITH WELL-ESTABLISHED PRINCIPLES OF *FORUM NON CONVENIENS*.

1. The Tenth Circuit has not announced a new standard for measuring evidence of private and public interest on *forum non conveniens*.

Petitioner's principal reason for seeking this Court's review is based on a flawed reading of the decision below. According to her petition, certiorari is warranted because the Tenth Circuit has announced a new standard by which evidence supporting a motion to dismiss for *forum non conveniens* must be judged. Pet. App. at 14–15. This "new standard," she suggests, conflicts with both the established precedents of this Court and decisions by other courts of appeals. *Id.* As a reading of the Tenth Circuit's decision makes clear, however, petitioner has confused the court's comments

on the sufficiency of respondents' evidence with its rationale for affirming the district court.

In discussing the record of private and public interest factors before the district court, the Tenth Circuit commented that, while respondents had met their burden, additional evidence would have been helpful nevertheless:

> Admittedly, Defendants have presented a bare minimum of evidence necessary for the court to conduct an informed balancing of factors. This court certainly would have benefited from additional evidence in the record. Nevertheless, in the context of this case, the items offered by defendant gave the district court enough information to conduct the balancing, and we find no abuse of discretion.

Pet. App. at 14a. From this statement, petitioner argues that the Tenth Circuit has established an entirely new standard against which to judge the sufficiency of evidence introduced to support a motion to dismiss for *forum non conveniens*.

Consistent with this Court's decision in *Piper*, the Tenth Circuit was not reviewing the evidence to decide the merits of the *forum non conveniens* issue *ab initio*. Rather, it weighed first whether the district court had sufficient evidence to consider all relevant public and private interest factors, and next whether the district court's balancing of those factors had been reasonable. Pet. App. at 7a. It correctly held that it was not to review *de novo* the evidence bearing on those factors. *Id.* And it expressly recognized that, under the controlling precedents of *Gilbert* and *Piper*, its tasks were to review whether the district court had undertaken the analysis required by those cases, and then to judge whether the district court's balancing of these factors was reasonable. *Piper*, 454 U.S. at 257. That is exactly what it did.

Viewed in this context, petitioner's suggestion that the phrase "a bare minimum of evidence" is a "new standard," "tantamount to no evidence at all," applicable to future *forum non conveniens* cases in the Tenth Circuit, may be dispensed with quickly. Pet. at 9, 15. However the Tenth Circuit may have characterized the evidence, it ultimately decided that it was sufficient for the district court to balance the public and private interests bearing on *forum non conveniens*. Clearly, the Tenth Circuit's precatory language suggests that more information would have been welcome, a not unexpected outcome given the fact-intensive, case-by-case task of addressing this issue. But when the Tenth Circuit held that the district court's consideration of the public and private interest factors was reasonable, it necessarily and expressly held that the evidence before the district court was "enough." Pet. App. at 14a. A "bare minimum," in short, does not mean a *new* standard; it means the minimum under the *existing* standard.

2. The Tenth Circuit has not reduced the burden on the moving party to show that an adequate alternative forum is more convenient than the one chosen by the plaintiff.

Petitioner also suggests that the decision below conflicts with this Court's precedents because it so lightens the moving party's burden to prove the relative inconvenience of the chosen forum, that, in effect, once a motion to dismiss is filed, the burden shifts back to the non-moving party to prove that its choice is more convenient than the alternative forum. Pet. App. at 15. This is derivative of petitioner's "new standard" argument, and fails for the same reasons. The Tenth Circuit correctly held that respondents bore the burden of proving that an alternative forum is both available and adequate. Pet. App. at 7a; *Piper*, 454 U.S. at 254 n.22. It recognized that the district court may decide, within its reasonable discretion, how much evidence is necessary to consider all

the relevant public and private interest factors. *Id.* at 257. It also expressly recognized that for district courts to retain the utility of declining jurisdiction for *forum non conveniens*, they must be allowed the flexibility to evaluate on a case-by-case basis whether it makes sense to do so. Quoting *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 44 (3d Cir. 1988), the court found that "[t]he amount of information needed to enable the district court to perform the balancing test depends on the facts of the particular case." Pet. App. at 14a.

The Tenth Circuit correctly noted that the presumption to defer to a plaintiff's choice of forum is overcome "only when the private and public interest factors clearly point toward trial in the alternative forum." Pet. App. at 6a; *Piper*, 454 U.S. at 255. It also found, consistent with *Piper*, that if the plaintiff is foreign, her choice of forum deserves less deference than it would if she were a United States citizen. Pet. App. at 11a-12a; *Piper*, 454 U.S. at 255-56; *accord, Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). It specifically rejected petitioner's suggestion that the district court erred by failing to define the amount of deference due to her choice of forum. *Id.* Petitioner's suggestion that the Tenth Circuit has relaxed or lightened the burden imposed on a party seeking dismissal for *forum non conveniens* is negated by the record and decision below.

3. The Tenth Circuit's decision does not otherwise conflict with the decisions of this Court, or of other courts of appeals, or of other panels of the Tenth Circuit.

Petitioner asserts that the Court should grant certiorari because the Tenth Circuit's decision is contrary to existing Supreme Court precedent, conflicts with the decisions of at least one other court of appeals, and is inconsistent with decisions of other panels of the Tenth Circuit. These assertions

are never fully developed in the petition, and the purported conflicts petitioner identifies are not true conflicts at all.

a. There is no conflict between the Tenth Circuit and the decisions of this Court.

In a case strikingly similar to this one, this Court in *Piper* unambiguously explained how lower courts are to address motions for *forum non conveniens*. The parallels between *Piper* and this case are undeniable. In both cases the claimant's decedents were killed in airplane accidents in Europe, involving airplanes and engines manufactured in the United States. 454 U.S. at 238-39. Wrongful death actions were in both instances filed in state court and then removed to federal court. *Id.* at 239-40. Each case was then transferred from one district court to another, and then dismissed by the transferee court for *forum non conveniens*. *Id.* at 240-44. Given these parallels, coupled with the Tenth Circuit's close adherence to how public and private interest factors were analyzed in *Piper* under factually similar circumstances, petitioner has identified nothing in the Tenth Circuit's decision that ought prompt this Court to revisit *forum non conveniens* in the context of aircraft accident litigation.

Because the Tenth Circuit's decision does not depart from the standard announced in *Gilbert* and *Piper*, the Court need not reconsider the particular facts on which the Tenth Circuit applied that standard in this case. Because "[e]ach case turns on its facts," *Williams v. Green Bay & W. R.R.*, 326 U.S. 549, 557 (1946), the Court has rightly refused to impose an inflexible, brightline rule governing what facts the district courts must consider to decide a motion to dismiss for *forum non conveniens*. The Court re-emphasized this point in *Piper*, holding that "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." 454 U.S. at 249-50.

b. There is no conflict between the Tenth Circuit's decision and those of other courts of appeals.

Petitioner also argues that the Tenth Circuit's decision conflicts with *Lony v. E.I. du Pont de Nemours & Co.*, 886 F.2d 628 (3d Cir. 1989). In petitioner's words, *Lony* "requires the district court to take a hard look at the evidence relating to liability, particularly where a plaintiff has shown that much of the evidence needed to establish liability is in the forum." Pet. at 15. In weighing whether the district court had paid sufficient deference to the plaintiff's forum choice, the Third Circuit observed that "the plaintiff has taken pains to show that much of the evidence it needs to establish liability is located in the forum it chose, and the conduct that caused the alleged injury issued from Delaware." 886 F.2d at 634. Based on this observation, petitioner argues that the Tenth Circuit failed to take this "hard look" at the supposed surfeit of liability evidence in Kansas and, that its decision therefore conflicts with the Third Circuit.

This argument fails for at least three reasons. First, it is based on the uncertain premise that if an airplane manufactured in Kansas crashes anywhere in the world, evidence of liability is in Kansas. Petitioner fails to consider the location of evidence concerning the pilot's negligence or of other potential causes of the accident. The Tenth Circuit did consider this, however, looking specifically to France, where some of the wreckage, an eyewitness, and the government accident investigators are located, and where a lawsuit is pending concerning Mr. Gschwind's business dealings before the accident. Pet App. at 4a-5a. The Tenth Circuit also considered the location of evidence surrounding a note suggesting suicide that Mr. Gschwind wrote to a business associate immediately before the accident. *Id.*

Second, petitioner's advocacy of a "hard look" at forum-based liability evidence would be more persuasive were she able to point to such evidence in Ohio, her chosen forum. In *Lony*, the Third Circuit found important the presence of liability evidence in the plaintiff's chosen forum in weighing whether the district court had given sufficient deference to the choice of forum. But because petitioner argues that liability evidence is in Kansas, her choice of an Ohio forum looks less convenient, and, therefore, under the Third Circuit's logic, deserves less deference. Certainly nothing in the Tenth Circuit's discussion of this issue is so at odds with *Lony* as to constitute a conflict.

Third, there is no conceptual conflict between taking a "hard look" and, having taken that look, concluding that there is a "bare minimum" of evidence to satisfy the standard. That *Lony* yields a different result based on a record wholly different from this case does not mean that the Third and Tenth Circuits are in conflict over *forum non conveniens*. Petitioner advances no principled reason for this Court to conclude that *Lony* would have been decided differently under the Tenth Circuit's application of *Gilbert* and *Piper*, or that the outcome here would have been different had the Third Circuit decided it.

Finally, although petitioner argues that the Tenth Circuit's decision is contrary to that of other Tenth Circuit decisions, she does not fully explain on what basis the opinions are inconsistent. Even had she done so, however, it would have little bearing on the petition. Ordinarily, a conflict between decisions rendered by different panels of the same court is not a sufficient basis for granting a writ of certiorari. *Wisniewski v. United States*, 353 U.S. 901 (1957).

B. THE PETITION PRESENTS NO JURISDICTIONAL ISSUE TO WARRANT THIS COURT'S REVIEW.

Despite petitioner's attempts to suggest otherwise, the Tenth Circuit's opinion did not address the issue of federal jurisdiction. After removal in Ohio, petitioner challenged federal jurisdiction in a motion to remand, but did so on a ground different from that argued in the petition. See note 1, *supra*. The federal court in Ohio denied the motion to remand, and petitioner raised no further jurisdictional challenge in the federal district court in Ohio, in the district court in Kansas following transfer, or in the Tenth Circuit on appeal from the order dismissing the case for *forum non conveniens*. The jurisdictional issue therefore formed no part of the decision petitioner is asking this Court to review.

Because the Tenth Circuit decision does not even address the jurisdictional issue, it does not give rise to a conflict with any other decision. There is no occasion, therefore, for this Court to resolve any conflict or correct any erroneous statement of law. In any event, the Court does not have the benefit of a record that could have been made had the jurisdictional issue been raised and decided below.[2]

Nor is there any practical reason to address the issue of federal jurisdiction at this late stage of the litigation. Three different federal courts have devoted more than three

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[2] This case is unlike *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir.), *cert. granted*, *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 589 (U.S. Dec. 7, 1998) (No. 98-470) (argued Mar. 22, 1999). In that case the issue is the order in which challenges to personal and subject matter jurisdiction should be addressed. In this case, because there was no jurisdictional challenge, that issue is not presented here, nor was it presented to or decided by the court of appeals. Petitioner correctly does not contend that *Marathon Oil* is relevant here in any way.

years to this case. Because the Tenth Circuit's decision does not address subject matter jurisdiction, it will have no value as precedent on that issue. The Court should not, based on the petitioner's unfounded concerns about the Tenth Circuit's decision on *forum non conveniens*, require that the case be remanded or dismissed now, after years of litigation, and impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836-37 (1989).

This is especially true where, as here, a finding of no federal jurisdiction would have little or no effect on the ultimate outcome of the case. Were it to be determined at this late date that federal jurisdiction was lacking, the case would return to the Court of Common Pleas in Ohio, where respondents would renew their motion to dismiss for *forum non conveniens*. Such a motion would likely be granted. The Ohio Supreme Court has recognized the doctrine of *forum non conveniens*, adopting the legal principles and standards established in *Gilbert*. *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 519 N.E.2d 370 (Ohio 1988). Its statement of the purposes of *forum non conveniens* and the applicable standards for considering motions to dismiss based on it, are entirely consistent with this Court's decisions. *Id.* at 373 ("[t]he criteria set forth in *Gilbert* and other United States Supreme Court decisions are to be applied flexibly, with each case turning on its own facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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